**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LAJEANA M. GOODNIGHT** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket No. 1,046,153 |
| **PRODUCT MANUFACTURING CORPORATION** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **ONEBEACON AMERICAN INSURANCE COMPANY** | ) | |
| Insurance Carrier | ) | |

## ORDER

Respondent appeals the August 28, 2009, preliminary hearing Order and the August 31, 2009, Order Nunc Pro Tunc of Special Administrative Law Judge Marvin Appling (SALJ). Claimant was awarded benefits in the form of temporary total disability compensation (TTD) and medical treatment with Ryan Livermore, M.D., as the authorized treating physician, as well as payment of all outstanding and related medical expenses of Dr. Livermore and Lyle W. Brooks, M.D.

Claimant appeared by her attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Kendall R. Cunningham of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the SALJ, and has considered the same record as did the SALJ, consisting of the evidentiary deposition of Lajeana M. Goodnight taken July 7, 2009; the transcript of Preliminary Hearing held August 24, 2009, with attachments; and the documents filed of record in this matter.

## ISSUES

1. Did claimant meet with personal injury by accident which arose out of and in the course of her employment with respondent? Claimant alleges an injury on December 3, 2008, when she hurt her right knee after attempting to pop her

supervisor's back by lifting her off the ground. Claimant and the supervisor both fell to the floor during the attempt. Claimant argues the back popping incident was horseplay which had occurred regularly in the workplace and was a regular incident of the employment. Respondent denies that back popping was a regular incident of the employment and, therefore, the incident was simply horseplay, which is non-compensable under the Kansas Workers Compensation Act (Act).

2. Should claimant be equitably estopped from claiming this matter as a work-related accident, after denying same and collecting short-term disability compensation?

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order and the Order Nunc Pro Tunc should be reversed and benefits denied, as claimant has failed to prove that she suffered an accidental injury which arose out of her employment with respondent.

Claimant worked as a shipping clerk for respondent. On December 3, 2008, while at work in respondent's shipping office, claimant's supervisor, Sonja Long, mentioned that her back was hurting. Claimant alleges that, at that point, Ms. Long instructed claimant to stand behind her and lift her off her feet, in order to pop her back. Claimant testified that before December 3, 2008, this activity had occurred between Ms. Long and two other employees of respondent several times a week (stating that it was less than ten times a week)[1]. Claimant testified at her deposition that the back popping occurred weekly between Ms. Long and other employees. However, Ms. Long denies ever having her back popped at work in the shipping office before December 3, 2008. The only times Ms. Long's back was popped were one or two occasions out in the parking lot with an employee named Zane Hutson, another shipping clerk. This activity only occurred in the parking lot and never in respondent's shipping office. Claimant also alleged that an employee named James Pete Bradley had popped Ms. Long's back, but both Ms. Long and Mr. Bradley deny that this ever occurred.

Finally, claimant testified that she was ordered to pop Ms. Long's back. However, both Ms. Long and a co-worker of claimant's named Leah Two-Hatchett testified that when Ms. Long mentioned her back pain, claimant volunteered to pop her back. In fact, at first, Ms. Long resisted and it was only after about 15 minutes of discussion that she finally relented and allowed claimant to try to pop her back. It was while claimant was attempting to lift Ms. Long to pop her back that they both fell and claimant suffered the injury to her knee.

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[1] P.H. Trans. at 8.

After the accident, claimant sought medical treatment with her family doctor, Lyle W. Brooks, M.D., through her husband's health insurance carrier. An Accidental Injury Claim Form submitted to her husband's insurance carrier stated that the injury occurred while "horse playing". Claimant also applied for short-term disability compensation through respondent. The short-term disability form states that claimant was injured "while horse playing".[2] In addition, claimant filed for benefits through her husband's Aflac policy. Claimant was referred to Dr. Livermore and underwent surgery, consisting of an ACL repair and a right knee fibular collateral ligament repair. After undergoing medical treatment, claimant returned to work initially part time and ultimately full time. Claimant's employment with respondent ended in May 2009. An E-1, Application For Hearing, alleging a December 3, 2008, work-related injury was filed on June 19, 2009.

## PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[3]

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[4]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[5]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental

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[2] P.H. Trans., Resp. Ex. 1.

[3] K.S.A. 2008 Supp. 44-501 and K.S.A. 2008 Supp. 44-508(g).

[4] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[5] K.S.A. 2008 Supp. 44-501(a).

> injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[6]

In this case, it is undisputed that claimant suffered an accidental injury which arose in the course of her employment with respondent. However, whether the injury arose out of the employment is contested. The burden to show that an injury arose out of the employment is on the claimant.[7] Claimant alleges that the action of popping the back of claimant's supervisor had become a regular incident of the employment. However, the supervisor, Ms. Long, denied ever having her back popped in respondent's shipping office before December 3, 2008. One employee did pop her back on one or two occasions in the parking lot, but those were the only times the back popping occurred. The law in Kansas supports compensability when the employer is aware of the activity, or where it has "become a habit at the workplace–in essence, placing the employer on constructive notice of its practice and destructive potential".[8] Here, the actions involving the popping of Ms. Long's back only occurred once or twice in the parking lot. There is nothing to show that this activity had become a habit in the workplace or that respondent was aware of the practice. This Board Member finds that the actions were only random and not a habit of the workplace.

Claimant also alleges that she was ordered to perform the act by Ms. Long. But, both Ms. Long and claimant's co-worker, Ms. Two-Hatchett, refuted this claim, testifying that it was claimant who aggressively pursued the back popping with Ms. Long. In fact, Ms. Long initially refused claimant's offer.

This Board Member finds that claimant was not ordered to perform the back popping activity, but, instead, did so voluntarily. This does not render the action work related. The decision by the SALJ awarding benefits in this matter is reversed.

The above decision renders moot the issue involving respondent's allegation that equitable estoppel should be applied to this matter.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[9] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

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[6] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[7] *Jones v. Lozier-Broderick & Gordon*, 160 Kan. 191, 160 P.2d 932 (1945).

[8] *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 130 P.3d 111 (2006).

[9] K.S.A. 44-534a.

as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

## CONCLUSIONS

Claimant has failed to prove that the injuries suffered to her right knee while she was popping her supervisor's back arose out of her employment with respondent. The preliminary Order and the Order Nunc Pro Tunc, awarding benefits, are reversed.

## DECISION

**WHEREFORE**, it is the finding, decision, and order of this Appeals Board Member that the Order and the Order Nunc Pro tunc of Special Administrative Law Judge Marvin Appling dated August 28, 2009, and August 31, 2009, respectively, should be, and are hereby, reversed.

**IT IS SO ORDERED.**

Dated this ____ day of October, 2009.

HONORABLE GARY M. KORTE

c: Brian D. Pistotnik, Attorney for Claimant
Kendall R. Cunningham, Attorney for Respondent and its Insurance Carrier
Nelsonna Potts Barnes, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge